

NO. 48093-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

D.J.M. (D.O.B. 3/19/00),

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY,
JUVENILE DIVISION

APPELLANT D.J.M.'S REPLY BRIEF AND
SUPPLEMENTAL ASSIGNMENT OF ERROR
AMENDED AS REDACTED ON PAGE 2

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TABLE OF CONTENTS

A. SUPPLEMENTAL ASSIGNMENT OF ERROR.....	1
B. ARGUMENT IN REPLY	1
1. Destiny’s waiver of conflict-free counsel was not made knowingly or intelligently, requiring reversal because her attorney represented Destiny and her co-defendant brothers in a single trial for assault based on accomplice liability	1
2. Destiny had the right to act in self-defense because C.H. was the first aggressor through a combination of words and conduct	5
3. The juvenile court should have considered whether Destiny was acting in self-defense because Destiny had withdrawn from the confrontation before the eventual second-degree assault occurred.....	7
4. Because the consequences of a juvenile adjudication are largely indistinguishable from an adult conviction, it is time to restore jury trials for juveniles	9
C. CONCLUSION	12

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<i>Monroe v. Soliz</i> , 132 Wn.2d 414, 939 P.2d 205 (1997)	9
<i>State v. Carter</i> , 15 Wash. 121, 45 P. 745 (1896).....	5
<i>State v. Craig</i> , 82 Wn.2d 777, 514 P.2d 151 (1973)	8
<i>State v. Dennison</i> , 115 Wn.2d 609, 801 P.2d 193 (1990)	8
<i>State v. Ellis</i> , 30 Wash. 369, 70 P. 963 (1902)	5
<i>State v. Lawley</i> , 91 Wn.2d 654, 591 P.2d 772 (1979)	9
<i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	6
<i>State v. Riley</i> , 137 Wn.2d 904, 976 P.2d 624 (1999).....	6, 7
<i>State v. Schaaf</i> , 109 Wn.2d 1, 743 P.2d 240 (1987).....	11
<i>State v. Wanrow</i> , 88 Wn.2d 221, 559 P.2d 548 (1977)	6
<i>State v. Wingate</i> , 155 Wn.2d 817, 122 P.3d 908 (2005)	6, 7

Washington Court of Appeals Decisions

<i>State v. J.H.</i> , 96 Wn. App. 167, 978 P.2d 1121 (1999)	11
<i>State v. Reagan</i> , 143 Wn. App. 419, 177 P.3d 783 (2008).....	5

United States Supreme Court Decisions

<i>Glasser v. United States</i> , 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942).....	1, 3
<i>Holloway v. Arkansas</i> , 435 U.S. 475, 98 S. Ct. 1173, 1178, 55 L. Ed. 2d 426 (1978).....	3, 4

Decisions of Other Courts

<i>In re L.M.</i> , 286 Kan. 460, 460, 186 P.3d 164 (Kan. 2008).....	10
--	----

Constitutional Provisions

Const. art. I, § 22	3
U.S. Const. amend. VI.....	3

Statutes

RCW 2.30.010	10
RCW 13.04.011	10
RCW 13.40.230	10
RCW 13.40.280	10
RCW 43.43.754	10
RCW 43.43.830	10

Other Authorities

Washington Courts, <i>Drug Courts & Other Therapeutic Courts</i> , available at https://www.courts.wa.gov/court_dir/?fa=court_dir.psc (last visited Nov. 29, 2016).....	11
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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Destiny was denied her constitutional right to the effective assistance of counsel because her attorney, who also represented her twin brother co-defendants, had an actual conflict of interest.

B. ARGUMENT IN REPLY

1. **Destiny's waiver of conflict-free counsel was not made knowingly or intelligently, requiring reversal because her attorney represented Destiny and her co-defendant brothers in a single trial for assault based on accomplice liability.**

Destiny was denied her constitutional right to conflict-free counsel because she did not knowingly or intelligently waive this right and joint counsel proceeded to represent her and her co-defendant twin brothers in an assault by accomplice liability trial.

The State's brief sets forth false assumptions to argue Destiny effectuated a knowing, intelligent and voluntary waiver of her right to an independent, zealous advocate. But as the State recognizes, every reasonable presumption must be weighed against an effective waiver. Resp. Br. at 16; *Glasser v. United States*, 315 U.S. 60, 70, 62 S. Ct. 457, 86 L. Ed. 680 (1942). Thus this Court cannot presume that Destiny had more information than the record reflects.

The State asserts that “Each waiver occurred after [the children] had already been afforded independent counsel.” Resp. Br. at 18. The State insinuates independent counsel advised Destiny on the benefits and disadvantages of joint counsel. But nothing in the record supports such an assumption. In fact, neither the written waiver nor the in-court colloquy suggests Destiny was advised independently. Joint counsel, moreover, filed her motion for substitution just days after independent counsel had been appointed. Accordingly, it cannot be presumed that Destiny was advised by independent counsel prior to waiving her right to conflict-free representation.

On the first day of trial the court asked the children, at the prosecutor’s request, to again state their waiver for the record. RP 9. Although by this time Destiny had signed a written waiver and assented during the short in-court colloquy, Destiny told the court she did not understand. RP 9; *see* CP 19-20; RP (4/7/15) 6.

THE COURT: Ms. Destiny -----, you are aware that potential conflicts could arise with respect to yourself and the other respondents in this case. Is it still your desire to waive any conflict and proceed with one attorney?

MS. MALLONEE: Do you understand?

MS. -----: No, I don't.

RP 9.¹ The State fails to engage every reasonable presumption against waiver when it argues Destiny was only confused by the “nature of the question posed” by the juvenile court. Resp. Br. at 18 n.9. The record does not suggest a more limited interpretation of this exchange, as the State posits. And the presumption against waiver prohibits such a reading. *See Glasser*, 315 U.S. at 70.

The State argues Destiny has not properly raised the issue because she has not alleged a constitutional violation. Resp. Br. at 19-30. But Destiny’s assignment of error specifically alleges ineffective assistance of counsel. Op. Br. at 1 (AOE 1). Ineffective assistance of counsel is the broader category of error here, a constitutional violation. *See* U.S. Const. amend. VI; Const. art. I, § 22; *Holloway v. Arkansas*, 435 U.S. 475, 481-83, 98 S. Ct. 1173, 1178, 55 L. Ed. 2d 426 (1978). Destiny also makes a supplemental assignment error above to the representation through actual conflict, in the event the Court agrees with the State’s argument as to the initial assignments of error.

Moreover, Destiny discussed the actual conflicts to which the joint representation subjected her in the opening brief. She argued her

¹ Joint counsel requested the opportunity to speak with Destiny off the record. RP 10. After a pause and an off-the-record discussion, Destiny confirmed her prior waiver. RP 10.

attorney was unable to effectively negotiate on Destiny's behalf because her attorney jointly represented Destiny's twin brothers who would benefit from having Destiny remain on the defense side throughout trial. *See* Op. Br. at 16. This was found to be a sufficient basis for conflict in *Holloway*, 435 U.S. at 490.

Additionally, an actual conflict existed because, at sentencing, joint counsel lacked the ability to argue individually for her clients. *See Holloway*, 435 U.S. at 490 (actual conflict can occur at sentencing). Instead, counsel filed a single sentencing brief in the three respondents' individual cases and the brief rarely identifies the respondents individually. CP 43-58. At the sentencing hearing, counsel's approach similarly promoted a single viewpoint for the common good. RP 485 ("the gravamen of our presentation is that there are very significant mental health difficulties experienced by the youngsters"), 516-17 (witness advocates for equal punishments among respondents), 615-20 (counsel discusses three clients as a single group). This hampered, for example, counsel's ability to argue the relative culpability of her clients because promoting one client's lesser accountability would have indicated her other clients' greater culpability. The duty to all three clients prevented counsel from singling out and promoting Destiny's

case. Counsel was also prevented from discussing relationships among the siblings and the influence Destiny's brothers might have had on her, because counsel also represented those brothers.

These are merely examples of the actual conflict that existed. Joint counsel pursued a joint defense of self-defense for the three respondents, charged as accomplices. But independent counsel may have elected to try the case differently for her or his individual client.

Only an actual conflict needs to be demonstrated on appeal. Once established, reversal is required. Appellate courts do not look at the practical effect of the conflict on the actual proceedings or otherwise judge prejudice. In other words, a harmless error test is not applied. *State v. Reagan*, 143 Wn. App. 419, 426, 177 P.3d 783 (2008).

2. Destiny had the right to act in self-defense because C.H. was the first aggressor through a combination of words and conduct.

Destiny had the right to act in self-defense if she had a good faith belief there is apparent danger to herself or another person. *State v. Carter*, 15 Wash. 121, 123, 45 P. 745 (1896). In assessing Destiny's good faith belief, the factfinder stands "in [her] shoes." *State v. Ellis*, 30 Wash. 369, 373, 70 P. 963 (1902); accord *State v. Wanrow*, 88

Wn.2d 221, 234-26, 559 P.2d 548 (1977); *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The factfinder’s focus must be on Destiny’s subjective belief; she does not need to be in actual danger to act in lawful self-defense. *Riley*, 137 Wn.2d at 909.

The juvenile court incorrectly determined that C.H.’s conduct was merely verbal and, therefore, did not trigger Destiny’s right to act in self-defense. RP 441-42; CP 32-33, 35 (FF VI, XIV; CL II). While words alone cannot give rise to a reasonable apprehension of bodily harm, even the State recognizes that C.H. did more than speak—he smirked at Destiny “like he was trying to start something with [her].” *Compare Riley*, 137 Wn.2d at 911-12 (there must be some conduct to trigger right to self-defense) *with* RP 288-89; Resp. Br. at 7, 34-35 (acknowledging Destiny reacted to C.H. smirking at her but disputing effect of the smirk).

The State defends the juvenile court’s error of law by relying on *State v. Wingate*, 155 Wn.2d 817, 822-23, 122 P.3d 908 (2005). But *Wingate* supports Destiny’s position that the juvenile court had to consider whether Destiny was acting in lawful self-defense (and, she was) when she responded to C.H. smirking at her “like he was trying to

start something.” *Riley* and *Wingate* hold that where there is some evidence of non-verbal conduct or conflicting evidence on whose conduct precipitated a fight, the factfinder must consider who acted in self-defense and who acted as the first aggressor. *Wingate*, 155 Wn.2d at 822-23; *Riley*, 137 Wn.2d at 911-12. Because evidence showed that C.H. smirked at Destiny, in a manner that demonstrated his interest in getting more physical with her, as judged from Destiny’s perspective and in addition to his extensive verbal harassment,, the court should have considered whether Destiny was acting in self-defense. Instead, the juvenile court found Destiny could not be acting in self-defense. RP 441-42; CP 32-33, 35 (FF VI, XIV; CL II). This Court should reverse.

3. The juvenile court should have considered whether Destiny was acting in self-defense because Destiny had withdrawn from the confrontation before the eventual second-degree assault occurred.

Generally, the right of self-defense cannot be invoked by an aggressor or one who provokes an altercation. However, if she in good faith first withdraws from the combat at a time and in a manner to let the other person know that she is withdrawing or intends to withdraw from further aggressive action, even an initial aggressor can invoke

self-defense in a subsequent altercation. *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973).

Even if Destiny was the first aggressor,² the juvenile court erred in denying Destiny's claim of self-defense because evidence showed she had withdrawn from the confrontation by stopping and walking away from C.H. *State v. Dennison*, 115 Wn.2d 609, 617, 801 P.2d 193 (1990) (right of self-defense may be revived if the aggressor in good faith withdraws from the combat "at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist"); RP 102 (Destiny walked around the cafeteria), 297-98 (Destiny stopped and stared at C.H., then saw him walking towards her from around the table), 348-49 (Destiny moved over a couple steps).

Destiny signaled her withdrawal from the confrontation. After C.H. smirked at her and she punched him, the two separated. RP 99-101, 102, 171, 297, 348; Exhibit 1 at 7:01:27-38. C.H. then re-initiated contact. He kept moving towards Destiny from the other side of the cafeteria table. Exhibit 1 at 7:01:27-42; RP 297-98. He threw his backpack down, signaled physically that he was ready to fight, and

² Destiny contests that she was the first aggressor in the section above, and does not concede that issue here.

angrily shouted in Destiny's face, "I fight bitches." RP 173, 178-80, 254-55, 281-83, 297-99; Exhibit 2 at 00:09-17; Exhibit 1 at 7:01:39-42. Thus, Destiny was not the first aggressor in the melee that caused injury to C.H.'s teeth. C.H. was the aggressor; Destiny was entitled to claim self-defense.

This Court should reverse because the juvenile court failed to consider this theory of self-defense.

4. Because the consequences of a juvenile adjudication are largely indistinguishable from an adult conviction, it is time to restore jury trials for juveniles.

Destiny and her juvenile co-defendants should have been afforded the right to a jury trial because the distinction between the juvenile and adult systems, and particularly, the difference between the consequences of a juvenile adjudication and an adult conviction, has substantially decreased. *E.g.*, *State v. Lawley*, 91 Wn.2d 654, 656, 591 P.2d 772 (1979) (pivotal question to determine whether juvenile is entitled to jury is whether juvenile proceedings are "so akin to an adult criminal prosecution"); *Monroe v. Soliz*, 132 Wn.2d 414, 420, 939 P.2d 205 (1997).

Kansas reinstated a juvenile's right to a jury trial under the federal constitution because its juvenile justice statutes "have become

more akin to an adult criminal prosecution.” *In re L.M.*, 286 Kan. 460, 460, 465-72, 186 P.3d 164 (Kan. 2008); *accord id.* at 472-73 (also holding juveniles have the right to jury trials under state constitution). This Court should reach the same holding in Washington.

The consequences attendant to a juvenile adjudication that mirror adult convictions now include:

- Longer sentences;
- A “clearly too lenient” aggravating factor, RCW 13.40.230(2);
- “Adjudications” are treated identically to “convictions” under the Sentencing Reform Act, RCW 13.04.011(1);
- Providing a DNA sample and paying the fee for it, RCW 43.43.754;
- Providing fingerprints, CP 72;
- No protection for background checks, RCW 43.43.830(6); and
- Potential to be housed in an adult prison, RCW 13.40.280.

At the same time, adult courts have focused more on rehabilitation of adult offenders—which was once considered a unique feature of the juvenile system. *See, e.g.*, RCW 2.30.010 (therapeutic courts created for rehabilitation of adult offenders); Resp. Br. at 53 (arguing rehabilitation is the “focus of the JJA”). These adult therapeutic court

programs, which exceed 80 in number, closely resemble the programming the State contends is a unique aspect of juvenile sentencing. *Compare* Washington Courts, *Drug Courts & Other Therapeutic Courts*, available at https://www.courts.wa.gov/court_dir/?fa=court_dir.psc (last visited Nov. 29, 2016) *with* Resp. Br. at 53-54.

In short, Destiny's adjudication will have a nearly indistinguishable effect from an adult conviction. However, Destiny was not afforded the right to a jury trial.

The State argues the punishments for juveniles and adults remain distinguishable. Resp. Br. at 54-55. But the State ignores that increased sentences are now available for juveniles and that following adjudication that adjudication is treated almost identically to an adult conviction under the SRA, in civil commitment proceedings and otherwise. *See supra* & Op. Br. at 22-27.

The State relies heavily on *State v. J.H.*, 96 Wn. App. 167, 978 P.2d 1121 (1999). But that case is almost 20 years old. The changes discussed above have largely come about, or become more severe, since *J.H.* and *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987). The distinction between criminal justice for adults and juveniles has

continued to blur. It is time for our courts to take another look at the lack of a jury right for juveniles.

In light of the changes to juvenile adjudications and under the state and federal constitution, the Court should hold Destiny was entitled to a jury trial.

C. CONCLUSION

The adjudication should be reversed because Destiny did not effectuate a fully informed, intelligent waiver of her right to conflict-free counsel and was thereby denied effective assistance, because she acted in self-defense, and because she was denied a jury trial.

DATED this 1st day of December, 2016.

Respectfully submitted,

s/ Marla Zink
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)	
D.J.M.,)	
)	
Juvenile Appellant.)	

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